

June 2001

Cases of Note-A&M Records et. al. v. Napster & UMG Recordings v. MP3.com

Bruce Strauch

The Citadel, strauchb@earthlink.net

Jack G. Montgomery

Western Kentucky University Libraries, jack.montgomery@wkyu.edu

Bryan M. Carson

Western Kentucky University Libraries, bryan.m.carson@gmail.com

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

Recommended Citation

Strauch, Bruce; Montgomery, Jack G.; and Carson, Bryan M. (2001) "Cases of Note-A&M Records et. al. v. Napster & UMG Recordings v. MP3.com," *Against the Grain*: Vol. 13: Iss. 3, Article 22.
DOI: <https://doi.org/10.7771/2380-176X.3502>

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries. Please contact epubs@purdue.edu for additional information.



LEGAL ISSUES



Section Editors: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>
Jack Montgomery (Western Kentucky University) <jack.montgomery@wku.edu>

Cases of Note —

A&M Records et al. v. Napster & UMG Recordings v. MP3.com



by **Bruce Strauch** (The Citadel) <strauchk@earthlink.net>

Copyright - The Big Napster Broo-Ha-Ha and the MP3.com Debacle

A&M Records, Geffen Records, Interscope Records, Sony Music Entertainment, MCA Records, Atlantic Recording Corp, Island Records, Motown Record Co, Capitol Records v. Napster

United States Court of Appeals for the Ninth Circuit

2001 U.S. App. LEXIS 1941; 57 U.S.P.Q.2d (BNA) 1729; Copy. L. rep. (CCH) P28,200

Filed, Feb. 12, 2001

\$BIG BUCKS\$ This brought out the heavyweights. Three pages of counsel including David Boies; Paul, Weiss, Rifkind; ACLU, every kind of Net and Info Tech and Digital Future coalition; artists and broadcasters' guilds; Baseball Songwriters Guild; the National Basketball Association (!); Association of American Physicians & Surgeons (!) and

nearly a page of law school professors showing in to claim real world experience.

This was on appeal from a district court's preliminary injunction ordering Napster to stop "engaging in, or facilitating others in copying, downloading, uploading, transmitting, or distributing plaintiffs' copyrighted musical compositions and sound recordings ... without express permission of the rights owner." *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp. 2d 896, 927 (N.D. Cal. 2000).

History & Transmission Mechanics

In 1987, MP3 (properly Moving Picture Experts Group MPEG-3) became a standard file format for "ripping" or copying an audio compact disk directly onto a computer's hard drive. Napster got into "peer-to-peer" file sharing by allowing its users to search each other's hard drives and

copy the contents. Napster's MusicShare software, technical support and a chat room were provided free of charge.

I can't resist giving you the legal cite on this.

"To download means to receive information, typically a file, from another computer to yours via your modem ... The opposite term is upload, which means to send a file to another computer." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting Robin Williams, *Jargon, An Informal Dictionary of Computer Terms* 170-71 (1993)).

A user logs onto the Napster server using a user name and password, and formats available files, the actual contents of which remain on the user's computer. Napster runs a "search index" of the collective directory. A user searches under either the name of an artist or the name of a song. *Napster*, 114 F.Supp. 2d at 906.

A downloaded file can either be played on the user's hard drive or copied onto an audio CD, in each case with diminished sound quality.

continued on page 69

You Gotta Go to School for That from page 67

ones) to office mates. Also, office mates should be apprised of any interesting web sites so they will not waste their time surfing inappropriately.

Rule #4: Betsy always gave encouragement and was sympathetic: The perfect office mate also understands that, along with joy, misery too enters the office relationship. Thus, complaints about parking tickets, bureaucracy (and bureaucrats), as well as the oppressive workload in general should be aired frequently between office mates to develop the feeling of shared misery. Care should be taken, however, to insure that violations of Rule # 1 do not occur.

Rule #5: Betsy answered any questions I put to her with the relish of a possessed reference librarian (like spelling things), and she always had a copy of the reference desk schedule — especially when I had lost mine: The perfect office mates

complement each other. Thus, one of the mates should be a good speller. At least one of them should be organized to a large degree. And at least one of them should know a minimum of three good restaurants in town.

Rule #6: Betsy smiled and laughed a lot: The perfect office mate exhibits kindness, a keen sense of humor, and the ability to laugh - even at themselves. This trait does not just gain points at cocktail parties, but is especially helpful when trying to juggle 12 projects at once, work the reference desk, and placate the PTB (powers that be).

Rule #7: Betsy referred to the students as "those poor wretches" whom she insisted on assisting far beyond the normal call of duty: The perfect office mate should possess at least one obvious enduring characteristic. Being known for a particular saying or action is good. Being known for several sayings or actions is better. Beware, however, that being known for a plethora of characteristics borders on

diminishing returns. Too many endearing characteristics may cause a person to be known as just odd.

Rule #8: Betsy knew a heck of a lot about business resources and government stuff: The perfect office mate is an expert in at least one area. Being known as the expert in a particular area gives one an aura of power and allows fellow office mates to bask in that aura vicariously without having to put forth a lot of effort.

Alas, **Betsy Jean** answered the call of the Appalachians. After three years of bliss as my office mate, she bought a quaint little house in the mountains 15 minutes from **Appalachian State University**. It wasn't long after that she accepted a position with **ASU** and moved into her dream home.

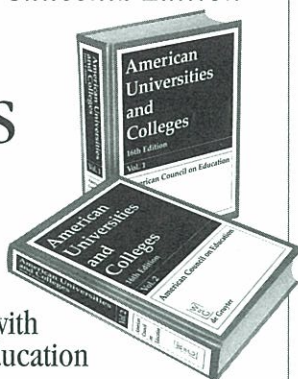
I cannot even say that she will make someone else a perfect office mate for, alas, she is getting an office of her own. Of course, that is the only thing better than having the perfect office mate — not having an office mate at all.

<<http://www.against-the-grain.com>>

NOW AVAILABLE

New, Completely Revised Sixteenth Edition

American Universities and Colleges



Produced in collaboration with the American Council on Education

This updated and expanded edition of **American Universities and Colleges** maintains its reputation as the foremost reference book on postsecondary education in the United States. The Sixteenth Edition has been enlarged both in the number of institutions represented (now over 1,900) and the amount of information provided. As always, material for each entry comes directly from the institutions themselves.

A two-volume set, **American Universities and Colleges** provides both the essential statistical data (tuition, room and board, admission requirements, financial aid, enrollments, etc.) and all the other information equally important to decision making (student life, library holdings, physical plant, accelerated and study abroad programs, etc.). Numerous charts and tables provide easy access to comparative data on relevant topics.

Published every four to five years, **American Universities and Colleges** is an indispensable reference work. *We invite standing orders.*

From Reviews of Earlier Editions:

"... no high school, public, or academic library reference collection is adequate without AUC."

—Choice

"... no other college guide provides such fine detail about institutions.... Reference librarians familiar with earlier editions needn't be convinced of its singular value or reminded of its unimpeachable authority.... it remains a central, not a marginal, source on colleges for academic, public, and high school libraries."

—Wilson Library Bulletin

"... a mainstay of education reference colleges.... Highly recommended for high school, public, and academic library reference collections, especially those that cannot afford a variety of general or specialized guides to higher education."

—American Reference Books Annual

2001. Approx. 2000 pages.

8 1/4 X 10 3/4 in. 2 volume set

3-11-016967-3 Hardcover \$249.50



Walter de Gruyter, Inc.

200 Saw Mill River Road, Hawthorne, NY 10532

Telephone 914-747-0110 • Fax 914-747-1326

www.degruyter.com

Cases of Note

from page 68

Preliminary Injunction

An injunction is a court order to either do or stop doing something. You can get a preliminary one — i.e. before a trial on the facts if you can show likelihood of success at trial and the possibility of irreparable harm if you don't get the order. *Prudential Real Estate Affiliates, Inc. v. PPR Realty, Inc.*, 204 F.3d 867, 874 (9th Cir. 2000).

Secondary Liability for Copyright Infringement

A third party must infringe copyright before there can be secondary liability — i.e. contributory infringement. *Religious Tech. Ctr. v. Netcom On-Line Communications Servs., Inc.*, 907 F. Supp. 1361, 1371 (N.D. Cal. 1995). Record companies had no trouble showing ownership of as much as seventy percent of the files on Napster. Most Napster users were directly infringing the rights of reproduction 17 U.S.C. § 106(1) and distribution § 106(3) and Napster really couldn't deny it with a straight face.

Fair Use Defense 17 U.S.C. § 107

Napster claimed sampling, space-shifting and permissive distribution were all fair uses. On a preliminary injunction, Plaintiffs must show a likelihood of overcoming the fair use defense. *See Atari Games Corp. v. Nintendo*,

975 F.2d 832, 837 (Fed. Cir. 1992).

Purpose and Character of the Use

Does the new work transform the character of the original or merely replace it? Hardly. *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y.) (finding that reproduction of audio CD into MP3 format does not "transform" the work), *cert. denied*, 2000 U.S. Dist. LEXIS 7439 (S.D.N.Y. June 1, 2000) ("Defendant's copyright infringement was clear, and the mere fact that it was clothed in the exotic webbing of the Internet does not disguise its illegality.").

Was the infringing use commercial or non-commercial? Napster users got music free they would otherwise have had to pay for. Napster didn't have to sell it in the marketplace. Repeated copying can be a commercial use even without offering the music for sale. *See Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 10, 1118 (9th Cir. 2000); *American Geophysical Union v. Texaco, Inc.*, 60 F.3d 93, 922 (2d Cir. 1994) (remember that big stink over researchers copying articles so as to not buy extra copies?)

Nature of the Use

Creative works are more worthy of protection than fact-based ones. *See Campbell*, 510 U.S. at 586. And music — whatever you might think of some of it — is creative.

Portion Used

Copying was wholesale.

Effect of Use on Market

A fair use should not materially impair the marketability of the work. *Harper & Row Publishers, Inc. v. Nation Enters*, 471 U.S. 539, 566-67 (1985). Napster reduced audio sales among college students and "raises barriers to plaintiffs' entry into the market for the digital downloading of music." *Napster*, 114 F. Supp. d at 93. The music companies' surveys of college students went right to the heart of the irreparable harm issue. If Napster isn't shut down, all that copying represents permanent lost sales.

Music companies, of course, were hot to get into selling digital downloads. Having this available for free on Napster would certainly block any attempt to charge for the same product.

Sampling

Napster argued that sampling to determine whether to make a purchase was a fair use and nothing more than what the music companies were already doing. The district court said, no, free promotional downloads were tightly controlled by the music companies. The companies either collected royalties from the Internet sites that ran the samples or programmed the songs to "time out" — exist only for a short duration on the downloaders' computer.

continued on page 70

Cases of Note

from page 69

Napster said, well what about a situation where sampling created a hit out a song that was otherwise limping along? It's still not fair use. See *Campbell*, 510 U.S. at 591 n.21.

And you can see the copyright logic here. If I own something, I have the right to do what I want with it, including let it languish. It makes little sense to permit someone to blunder around using my property on the off-chance my sales might increase.

Space-Shifting

If a Napster user down-loaded music already owned to listen to it on audio CD, this would be space-shifting. This goes back to the old Sony case about copying a t.v. show for viewing later. Sony lost in that one because the viewer was not selling the copy to the public, just viewing it himself. And Napster went beyond aiding the original owner to distribute the music to the general public.

Permissive Recording

Many artists want to do an end-run around the big music companies by creating an audience on their own. Record companies did not challenge this use of music by Napster under its New Artist Program. The companies didn't own the product after all.

Secondary Infringement Again

To have contributory liability, Napster must "know or have reason to know" of the direct infringement. *Cable/Home Communication Corp. Network Prods., Inc.*, 902 F.2d 829, 845 & 846 n.29 (11th Cir.). Napster knew what was going on, and there is no requirement that it know of specific acts. In fact, a deadly document created by Napster noted "the need to remain ignorant of users' real names and IP addresses 'since they are exchanging pirated music'". 114 F. Supp. 2d at 918.

Oops.

And Napster promoted its site by listing infringing files.

Respondeat Superior

I'm not really sure how this slid into the opinion, and the Court acknowledges that the doctrines of contributory infringement and vicarious liability are confused.

The master is liable for the torts of his servant. But this rule is broader than employer-employee relationships and can apply where Napster "has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities." *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

The infringing material acted as a draw for Napster customers. As the userbase increased, Napster's revenue grew.

Napster had the right and ability to supervise. It controlled access to its system and reserved the right to terminate accounts with or without cause.

Now What?

Of course, we all know this is a case of closing the barn door after the gnutella techno-cow has already skedaddled, and this case won't protect the music industry, merely give it the pleasure of squashing Napster.

What interests me about the Big Issue is why folks feel clean about stealing music. Granted, college kids are egomaniacs who think they are entitled to free stuff. Granted, ever since the 1960s, rock stars have presented themselves as wild and woolly buccaneers out to assault the senses and sensibilities of bourgeois society. So why shouldn't their fans feel the same.

But there's a larger issue here that goes to legal ethics. The ethical rule of the market place is called good faith and fair dealing. Give your adversary what he reasonably ex-

pects to receive. The buyer lives up to his part of the bargain. He pays the price of the CD. It's the seller who's the skunk.

As far back as when the industry jumped from 45 to 33 rpm format for records, it has been engaged in a truly dirty business of tying lousy products to a few hot songs at a grossly inflated price. And, of course, the moguls shove their L.A. music scene lifestyle excess in your face at every opportunity in the media.

The consumer wants a party mix of songs that the industry is not prepared to deliver. An irritating song completely destroys listening continuity. And of course irritation is in the ears of the beholder and will vary widely. Until the record moguls wise up and sell the consumer what is desired in a clean format, the piracy will continue to the outer limits of technological feasibility.

Copyright - Real Obvious Infringement

This is an interesting companion case to go along with Napster.

Forbes ASAP, April 2, 2001, pp. 35-39 has a good article on **Michael Robertson**, wonderboy behind **MP3.com**. To add my transformative cuteness, let me say that I have known folks in the creative end of the music biz since college. They all tell me the same complaint about the industry.

The "suits" (although few wear them now) have no music background. They didn't even take piano at age eight. They can't play an instrument, can't write or read music, indeed, have no apparent interest in music. Seemingly the only reason for them to be there is the cocaine and hottub lifestyle. If you're a kinetic motormouth, all those speed drugs and non-stop jabbering into a headset is your idea of high living.

They make decisions on what to publish at long tables with the volume turned so high it distorts the music. The head dude sits at the end of the table and nods yea or nay and the rest stampede along with him.

Their grotesque profits grow out of (1) signing a few desperate bands for very little money and then working them to death on the road; (2) limiting the amount of product on the market and dictating through limited radio time what the mass consumer will hear. The huge price of creating a hit over radio doesn't bother them because it's all funny money expenses that's part of the suit lifestyle. Remember, "payola" goes back to the earliest days of rock and roll.

Looked at from the suits' end, the "creative" types are a pack of tattooed loonies who can't really play their instruments and rapidly devolve into drooling drug melt-down and pointless acts of violence. Backing any of them is high-risk.

What the suits overlook is that music can be more enjoyable if you feel you're in an exclusive group of cognoscenti. And lousy

music is just lousy music and no one wants to hear it. We baby-boomers were so mass acculturated as to feel we were global-village hip when everyone listened to **Dylan** at exactly the same moment. But we also ground our molars when truly awful songs kept being played over and over on AM radio because someone in NY/LA was pushing a junk product.

The new model is Athens, Georgia bar bands, the old **Grateful Dead** and **Widespread Panic**. And among these folks are some musicians à la **Perry Barlow** or **Dave Matthews** who are actually quasi-thoughtful and are reaching consumers in a meaningful way.

So, along came Michael Robertson with a genius idea. Use MP3 technology to cut out the bloated music companies. Sign unknown bands to put their music up for free and take it right into the consumers' homes and cars. Deliver a "celestial jukebox" with any and every kind of music that was being written world-wide. Let the consumer choose from a staggering menu that included "trance" and "techno," whatever in heck they are.

And by gosh, he did it. He signs 200 bands daily, and a million listeners come to his site. Daily. And with a catalog bigger than any music company and a broad taste in the public's appetite whetted, he's now got 200 radio stations playing his material.

And then he did something that all the lawyers warned him against and may very well destroy the company. He tried a variation on Napster.

UMG Recording, Sony Music, Warner Bros. etc. & etc. v. MP3.com, United States District Court (S.D.N.Y.), 92 F.Supp. 2d 349; 2000 U.S. Dist. Lexis 5761 (May 4, 2000).

Launched in Jan. 2000, "**My.MP3.com**" offered subscribers the service of storing, customizing and listening to recordings the subscribers owned wherever they had an Internet connection.

continued on page 71

Cases of Note from page 70

To get into this, a subscriber had to prove ownership of a particular CD through the "Beam-it Service", but from there on out, would be listening to MP3.com's CD.

Robertson's reasoning made sense. If I go over to your house and we swap the same CD, what difference does it make if I'm listening to yours and you to mine. What he refused to see, was MP3.com was buying CDs by the thousands and copying them for replay without authorization. It was copying when it put them in MP3 format to be played over its servers.

Fair Use - Purpose and Character

Well, of course it was commercial. Subscribers didn't pay a fee, but the objective was to draw enough of them to put up advertising.

Did it transform it by giving it new meaning or understanding? See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). MP3.com claimed it was transforming the music by "space shifting" — permitting the listener to hear his own music without dragging it around with him. But that's not transformation. The pirated copies were just being retransmitted in another medium. See, e.g., *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104, 108 (2d Cir. 1998) (service transmitted copyrighted radio broadcasts over telephone lines). MP3.com was adding no new "aesthetics, ... insights and understandings." *Castle Rock*, 150 F.3d at 142. It was repackaging to transmit the same music expression in another medium.

Nature of the Copyrighted Work

Well, we're right in there with creative stuff — the core of what copyright protection is all about. *Campbell*, 510 U.S. at 586.

Amount and Substantiality

Yep. MP3.com copied the whole thing.

Effect of the Use on the Market

Music companies have a right to license their recordings. 17 U.S.C. § 106. MP3.com fell back on the argument that what they were doing would only enhance sales since the subscriber had to buy the CD. But of course, a positive impact has nothing to do with it. You start messing around with my product, you might get a positive impact or a negative one. If I don't want to take the risk, I tell you, No, keep your hands off my product. Otherwise, I license you the right to mess around with it.

Huh?

MP3.com's final argument was if they didn't do it, "real" pirates would. In other words, there's consumer demand out there, and music companies may as well face up to it and let MP3.com take the product for semi-free.

Of course, there's a certain logic to it. MP3.com's system forced a sale of a CD with profits flowing to the music companies. Truly pirated copies bring no income flow. And yes, it's going to happen anyway. But this flies in the teeth of what everyone deep down believes about private property. If it's mine, I have a right to refuse to evolve with consumer demand and run the industry into the ground. I'm entitled to be a fool.

So How Bad Is It for MP3.com?

Rather than appeal — and what earthly basis did he have for appeal? — Robertson chose to negotiate a settlement of \$170 million, the largest copyright settlement in history. And, of course, there are many record companies not in the suit so there are still big damages lurking.

Forbes has Robertson thinking in Internet terms where six months is a long time. Beam-It is only a small part of the larger game plan. He has a car music player that holds 100 gigabytes — that's 2,200 CDs ready to serve all those techno and trance fans.

Legally Speaking — Domain Names, Cybersquatting, and the ICANN System

by **Bryan M. Carson, J.D., M.I.L.S.** (Coordinator of Reference and Instructional Services, Western Kentucky University Libraries, 1 Big Red Way, Bowling Green, Kentucky 42101; Phone: 270-745-5007, Fax: 270-745-2275) <bryan.carson@wku.edu>

*"What's in a name? That which we call a rose by any other name would smell as sweet."*¹

This column is about names, because in these days of the Internet, domain names do make a big difference. Yet how much do we really think about the names that we enter to find Websites? Without the **Domain Name System (DNS)** currently in place, we would have links such as 255.15.543.² Needless to say, this would make the Web much less use-

ful. In order to make sure that the **DNS** registry runs smoothly, all of us need to understand how it operates, and what the laws are that regulate domain name disputes. The Internet is like the Wild West—there are many disputes, but also attempts to introduce order.

Those of us who were early users of the World Wide Web remember when big corporations like **McDonald's** didn't have their

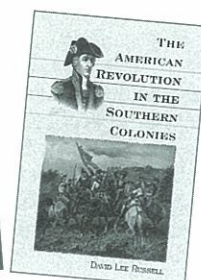
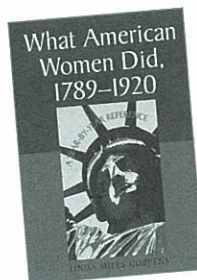
continued on page 72

What American Women Did, 1789–1920

A Year-by-Year Reference

Linda Miles Coppins

271pp., \$38.50 hardcover, 67 photographs, tables, notes, bibliography, index
ISBN 0-7864-0899-5 2001



The American Revolution in the Southern Colonies

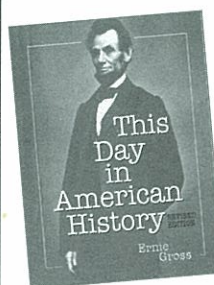
David Lee Russell

375pp., \$55 hardcover, photographs, maps, notes, bibliography, index,
ISBN 0-7864-0783-2 2000

Soviet Chess 1917–1991

Andrew Soltis

478pp., \$55 hardcover, photographs, tables, notes, bibliography, appendix, indexes, 2000 Historical Book of the Year—United States Chess Federation
ISBN 0-7864-0676-3 2000



This Day in American History, rev. ed.

Ernie Gross

348pp., \$55 hardcover, index
ISBN 0-7864-0854-5 2001



McFarland

Box 611 • Jefferson NC 28640

www.mcfarlandpub.com

Orders 800-253-2187

FAX 336-246-5018